

PROGRAM MEMORANDUM

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Subject: HIPAA Enforcement Is Not Preempted By COBRA; Non-HIPAA-Related State Insurance Law Is Not Preempted By Public Sector COBRA

Market: Group

I. Purpose

This bulletin conveys the position of the Centers for Medicare & Medicaid Services (CMS) regarding State enforcement authority under HIPAA and other state laws with respect to insurance coverage that is being provided as COBRA continuation coverage through a group health plan of a state or local government employer. The fact that insurance coverage happens to be COBRA continuation coverage will have no bearing on the states' or CMS's HIPAAⁱ enforcement authority unless there is a direct conflict between the two federal laws. In addition, the COBRA law that applies to State and local government employersⁱⁱ does not establish a blanket preemption of state law remedies in situations in which an issuer's act or practice violates both state law and public sector COBRA requirements.

II. Background

A. HIPAA Enforcement Authority

In most cases, states have primary enforcement authority with respect to HIPAA requirements that apply to health insurance issuers that offer coverage in the group health insurance market. This is true whether the group health plans that purchase the coverage are sponsored by private sector or public sector employers. CMS has enforcement

ⁱ Part A of title XXVII of the Public Health Service (PHS) Act, as added by title I of the Health Insurance Portability and Accountability Act of 1996 and amended by the Newborns' and Mothers' Health Protection Act of 1996 (NMHPA), the Mental Health Parity Act of 1996 (MHPA), and the Women's Health and Cancer Rights Act of 1998 (WHCRA). In this bulletin, the acronym "HIPAA" encompasses title I of HIPAA, NMHPA, MHPA and WHCRA and "HIPAA requirements" refers to the requirements of all of these statutes.

ⁱⁱ Title XXII of the PHS Act, for which CMS has advisory jurisdiction. In this bulletin we will refer to the provisions of title XXII of the PHS Act as "public sector COBRA." We will use the term "private sector COBRA" to refer to the statutory provisions in the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code that apply to non-governmental employers.

authority with respect to those issuers only if CMS first determines that a state is not substantially enforcing a HIPAA requirement.ⁱⁱⁱ (See 45 CFR § 150.101(b)(2).)

B. COBRA Enforcement Authority

Public sector COBRA is governed by Title XXII of the PHS Act, 42 U.S.C. 300bb-1 through 300bb-8. Under section 2207 of the PHS Act, a COBRA qualified beneficiary has a private cause of action for equitable relief in the case of a state or local government employer that fails to comply with a requirement of title XXII of the PHS Act. CMS has only advisory jurisdiction with respect to COBRA as it applies to state and local government employers and their group health plans. Private sector COBRA is enforced by the Departments of Labor and the Treasury.^{iv} States have no direct enforcement authority with respect to federal public sector or private sector COBRA requirements.^v

III. HIPAA and COBRA

There is a common misperception that when group health plan coverage provided by state and local government employers is COBRA continuation coverage, COBRA law applies to the exclusion of HIPAA and other state laws. That is not correct. Coverage sold to a group health plan maintained by a state or local government employer can be subject to more than one statute simultaneously. Generally, unless a federal statute overrides another federal statutory requirement, or preempts a state statute, all applicable statutes operate concurrently.

ⁱⁱⁱ Also, under 45 CFR § 150.101(b)(1), CMS enforces HIPAA provisions that apply to non-federal governmental employers and the group health plans that they maintain. The Employee Benefits Security Administration (EBSA), Department of Labor, and the Internal Revenue Service (IRS), Department of the Treasury, share responsibility for HIPAA enforcement with respect to private sector employers and their group health plans. However, neither EBSA nor IRS has enforcement authority against a health insurance issuer that violates HIPAA in the health insurance coverage it issues to a private sector employer. (EBSA's enforcement authority is restricted by section 502(b)(3) of ERISA (29 U.S.C. 1132(b)(3)), and IRS' authority to impose tax penalties for HIPAA violations is limited to private sector employers and their group health plans by 26 U.S.C. 4980D of the Internal Revenue Code of 1986, as amended.)

^{iv} EBSA and IRS jointly enforce COBRA provisions with respect to private sector employers and their group health plans. (See sections 601– 608 of ERISA (29 U.S.C. 1161 -- 1168) and 26 U.S.C. 4980B of the Internal Revenue Code.) Also, IRS has authority, in accordance with 26 U.S.C. 4980B(e)(1)(B) and (c)(4)(C), to impose upon issuers of private sector group health plan coverage excise tax penalties that shall not exceed \$2,000,000 during a taxable year, in the aggregate, with respect to all plans insured by an issuer for failure to provide COBRA continuation coverage to qualified beneficiaries as required by 26 U.S.C. 4980B(f). However, IRS has no authority to impose an excise tax on issuers of public sector group health plan coverage for failure to comply with any public sector COBRA requirement of 42 U.S.C. 300bb-1 *et seq.*

^v States may have “mini-COBRA” laws that apply to group insurance sold to employers with fewer than 20 employees, but the federal public sector COBRA provisions apply only to employers of 20 or more employees. Also, states may have continuation of coverage requirements that are more generous than federal public sector COBRA standards. More generous state requirements may apply regardless of a state or local government employer's size and those requirements are not preempted by the public sector COBRA provisions of 42 U.S.C. 300bb-1 *et seq.* See *Orlofske v. The City of Wheeling*, 212 W. Va. 538, 575 S.E.2d 148 (2002).

For example, public sector COBRA specifies how long the group coverage must continue for a specific participant or beneficiary under the group health plan. The only HIPAA requirement that deals with “how long” the policy must be kept in effect would be the guaranteed renewability requirement at section 2712 of the PHS Act, which mandates that coverage can be renewed at the option of the plan sponsor. Thus, the COBRA requirement would not conflict with HIPAA, because guaranteed renewability requirements in the group market protect employers, not individual participants in group health plans.

Regarding violations, when a group health plan is subject to both public sector COBRA and HIPAA requirements, a single act or practice by the plan could violate either HIPAA or COBRA. For instance, if a group health plan sponsored by an employer that employs more than 50 employees has lower annual and lifetime dollar caps for mental health benefits as compared to medical and surgical benefits, that would violate the HIPAA mental health parity requirements. However, the provision would not violate COBRA as long as the mental health benefits limitations apply equally to COBRA qualified beneficiaries and similarly situated individuals covered by the group health plan who have not experienced a COBRA qualifying event. Conversely, a group health plan that, without regard to health status-related factors, provides a lower level of overall coverage to COBRA qualified beneficiaries as a group than that made available to active employees and their dependents would violate COBRA, but not HIPAA.

Also, a single act or practice by a group health plan could violate both HIPAA and COBRA simultaneously, as shown in the following examples. In each example, the following assumptions apply: a state or local government employer is the sole sponsor of the group health plan; coverage under the plan is provided through insurance that is subject to all HIPAA requirements; and the federal public sector COBRA provisions also apply because the employer employs at least 20 employees. Additionally, with respect to the following examples, we note that CMS has enforcement authority with respect to the nonfederal governmental employers, and with respect to the health insurance issuers if CMS determines that a state is not substantially enforcing HIPAA requirements.^{vi} The examples presented below are for illustrative purposes. A determination regarding a violation of COBRA, HIPAA or state law is dependent upon the particular facts and circumstances of a given case.

Example 1. Mr. Johnson was hired by a county and enrolled in its group health plan when he was first eligible. Coverage became effective with his first day of employment. He was subject to a 12-month preexisting condition exclusion period under the terms of the plan as set forth in the health insurance policy because he had no prior creditable coverage. After being employed by the county for 7 months, Mr. Johnson terminated his employment. He was offered, and elected, 18 months of COBRA continuation coverage. The issuer imposes a new 12-month preexisting condition exclusion period when COBRA continuation coverage begins.

^{vi} In accordance with 45 CFR §§ 150.301 and 150.305(a), CMS can impose a civil money penalty against the issuer. In accordance with 45 CFR §§ 150.301 and 150.305(c), CMS can impose a civil money penalty against the nonfederal governmental employer. (If CMS has enforcement authority with respect to both a health insurance issuer and a nonfederal governmental employer, CMS can subject the issuer to a civil money penalty irrespective of whether CMS imposes a civil money penalty on a nonfederal governmental employer and vice versa.)

The group health plan is in violation of the COBRA requirements of section 2202(1) of the PHS Act,^{vii} and both the plan and the issuer are in violation of the HIPAA requirements of section 2701(a)(2) of the PHS Act. Section 2701(a)(2) provides that a group health plan and a group health insurance issuer may impose a preexisting condition exclusion on an individual, subject to certain limitations, including that the exclusion period may not exceed 12 months after the enrollment date with respect to an individual who enrolls when first eligible.^{viii} Because Mr. Johnson has elected to continue coverage under the plan, the preexisting condition exclusion period may be continued under the health insurance coverage only for an additional 5 months once COBRA coverage begins. Mr. Johnson already has met the first 7 months of the exclusion period prior to his termination of employment. The state has HIPAA enforcement authority against the issuer with respect to the requirements of section 2701(a)(2) of the PHS Act, as incorporated into state law.

Example 2. Mr. Jones is employed by a public school district and has self-only coverage under its group health plan. Mrs. Jones is employed by a different employer and has self-only coverage through her employer's plan. Mr. Jones terminates employment with the school district and elects COBRA continuation coverage for the maximum period of 18 months. Nine months into his period of COBRA coverage, Mrs. Jones terminates employment. Within 30 days of Mrs. Jones' loss of coverage, Mr. Jones attempts to add his wife to his COBRA coverage, which is less expensive than COBRA coverage available through her former employer. Mrs. Jones meets all other requirements of section 2701(f) of the PHS Act for special enrollment under HIPAA. Under the terms of the plan as set forth in the health insurance policy, a dependent of an active employee is entitled to a special enrollment period based on loss of other coverage, but special enrollment is not permitted with respect to COBRA continuation coverage.

The group health plan is in violation of the COBRA requirements of section 2202(1) of the PHS Act (because the continuation coverage provided does not permit special enrollment, and therefore is not identical to the coverage provided under the plan to similarly situated individuals with respect to whom a COBRA qualifying event has not occurred)^{ix} and both the plan and the issuer are in violation of the HIPAA special enrollment requirements of

^{vii} Section 2202(1) of the PHS Act provides that COBRA continuation coverage must be identical to the coverage provided under the plan to similarly situated individuals with respect to whom a COBRA qualifying event has not occurred. Because similarly situated active employees are subject to a preexisting condition exclusion period that does not exceed 12 months, a former employee from that employee group who has elected COBRA continuation coverage cannot be subjected to an exclusion period that exceeds 12 months, including that portion of the exclusion period that applied before the COBRA qualifying event. This requirement is consistent with principles set forth in private sector COBRA regulations promulgated by IRS at 26 CFR § 54.4980B-5, Q&A-2 and Q&A-3.

^{viii} In accordance with 45 CFR § 146.111(a)(1)(ii), the 12-month period after the enrollment date is determined by reference to the anniversary of the enrollment date. Thus, if the enrollment date in Example 1 is September 22, 2003, the 12-month preexisting condition exclusion period under the plan would end on September 21, 2004. The election of COBRA continuation coverage does not establish a new enrollment date under the plan.

^{ix} COBRA regulations promulgated by IRS at 26 CFR § 54.4980B-5, Q&A-5 provide that private sector COBRA continuation coverage is subject to the special enrollment requirements of HIPAA. There is no basis for differentiating between private sector and public sector COBRA regarding the applicability of HIPAA special enrollment requirements.

section 2701(f) of the PHS Act. The state has HIPAA enforcement authority against the issuer with respect to the requirements of section 2701(f) of the PHS Act, as incorporated into state law.

Example 3. A township that maintains a group health plan purchases a group health insurance policy that provides that enrollees of the plan who lose coverage cannot elect COBRA continuation coverage unless they meet certain requirements. If the individual had incurred more than a specific dollar amount of expenses under the policy during the 12-months preceding the event that results in loss of coverage, he or she must pass medical underwriting in order to obtain the COBRA benefits. Mrs. Smith, who has a serious, chronic medical condition, was covered under the plan as a dependent spouse through her husband's employment. She and her husband divorced, causing her to lose coverage under the group health plan. Divorce is a COBRA qualifying event that entitles a divorced spouse to elect up to 36 months of continuation coverage under the plan if the plan administrator is notified of the divorce within 60 days of the date of the divorce. Mrs. Smith timely notified the plan administrator of the divorce. The plan refused to offer her COBRA coverage because her utilization of benefits during the preceding 12-month period exceeded the dollar limit under the terms of the plan and she failed to pass medical underwriting.

The group health plan is in violation of the COBRA requirements of sections 2201, 2202 and 2206 of the PHS Act,^x and both the plan and the issuer are in violation of the HIPAA requirements of section 2702(a)(1) of the PHS Act. Section 2702(a)(1) of the PHS Act prohibits a group health plan maintained by a nonfederal governmental employer, and a health insurance issuer offering group health insurance coverage in connection with such a plan, from discriminating with respect to the "eligibility (*including continued eligibility*) of any individual to enroll under the terms of the plan based on . . . health status-related factors in relation to the individual or a dependent of the individual[.]" [Italics added.] Specifically, the plan and issuer have engaged in prohibited discrimination based on the following health status-related factors of section 2702(a)(1): (A) health status; (B) medical condition; (C) claims experience; (D) receipt of health care; (E) medical history; and (G) evidence of insurability. The state has HIPAA enforcement authority against the issuer with respect to the requirements of section 2702(a)(1) of the PHS Act, as incorporated into state law.

IV. Public Sector COBRA Does Not Preempt Remedies Available Under State Law for Actions that Simultaneously Violate State Insurance Law and Public Sector COBRA

States have no authority to directly enforce federal public sector or private sector COBRA laws. However, it is CMS's position that, absent a conflict between federal and state law,

^x Section 2201(a) of the PHS Act requires that each group health plan that is maintained by a state or local governmental employer must provide that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled to elect COBRA continuation coverage. Section 2202(4) of the PHS Act provides that COBRA continuation coverage may not be conditioned upon, or discriminate on the basis of lack of, evidence of insurability. Section 2206 of the PHS Act provides, in pertinent part, that if a plan administrator is notified of a divorce within 60 days of the divorce, the plan administrator must notify the divorced spouse of his or her COBRA rights within 14 days of the date on which the plan administrator is notified of the divorce.

public sector COBRA requirements (title XXII of the PHS Act) do not preempt state law. That is, states may enforce state insurance laws and regulations in instances when an issuer's actions violate both state law and the public sector COBRA law. Similarly, it is CMS's position that individuals may pursue remedies available to them under state law in the case of a public sector COBRA violation. CMS's policy is supported by the position taken by the 9th U.S. Circuit Court of Appeals in *Radici v. Associated Insurance Companies*, 217 F.3d 737 (9th Cir. 2000). The court's ruling overturned a district court opinion that held that the private cause of action for equitable relief afforded individuals by section 2207 of the PHS Act is an exclusive remedy that preempts individuals' state law claims. The district court held that the PHS Act preempts state law claims by analogy to ERISA's preemption of state law claims. The 9th Circuit Court of Appeals found that the preemption provision of section 514 of ERISA should not be analogized to the PHS Act, which lacks a broad federal preemption provision, and that the preemptive effect of ERISA does not, in fact, create a PHS Act preemption. Thus, the court concluded that the COBRA provisions of the PHS Act do not preempt state law. Note, however, that if a state law provision were to make it impossible to comply with a public sector COBRA requirement (e.g., a state law prohibited an issuer from making continuation coverage available for longer than 12 months), the state law *would* most likely be preempted in that specific instance. However, absent such a conflict, there is no blanket PHS Act preemption of state laws.

Example. A public school district has done everything it was required to do regarding an individual's COBRA coverage. However, while the insurance issuer accepted the individual's COBRA premiums, as a result of an administrative error it did not enroll the individual for COBRA coverage and did not promptly correct the situation when notified of the problem.

The state is not precluded from enforcing state laws and regulations, including by imposition of penalties that may apply to an issuer that accepts premiums but does not pay claims. Also, the individual whose public sector COBRA coverage was not put into effect may pursue any state law remedies available to him or her.

Where to get more information:

The regulations cited in this bulletin are found in Part 150 of Title 45 and Part 54 of Title 26 of the Code of Federal Regulations (45 CFR §§ 150.101, 150.301 and 150.305; 26 CFR § 54.4980B-5, Q&A-2, Q&A-3 and Q&A-5). Information about HIPAA and public sector COBRA also is available on CMS's website at www.cms.hhs.gov/hipaa1 and www.cms.hhs.gov/hipaa1/cobra, respectively.

If you have any questions regarding this bulletin, you may call the HIPAA Insurance Reform Help Line at 1-877-267-2323 ext. 61565.